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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. GAVIN GARFIELD, Defendant and Appellant.	C039824 (Super. Ct. No. 00F03098)

A jury convicted defendant Gavin Garfield of 13 counts of sexual misconduct with 16-year-old K. S. between December 1, 1999, and February 6, 2000. Defendant was convicted of oral copulation with a minor (counts one through six) (Pen. Code, § 288a, subd. (b)(1));[1] penetration of a minor with a foreign object (counts seven and eight) (§ 289, subd. (h)); and unlawful sexual intercourse with a minor more than three years younger

[1] Further undesignated section references are to the Penal Code.

than the defendant (counts nine through thirteen) (§ 261.5, subd. (c)).

Following lengthy sentencing proceedings and after considering four psychological evaluations, the trial court denied defendant probation. The trial court sentenced defendant to state prison for five years four months under a combination of consecutive and concurrent sentences.

On appeal, defendant contends (1) the mandatory sex offender registration requirement for oral copulation with a minor violates equal protection (§ 290, subds. (a)(1)(A), (a)(2)(A)); and (2) the trial court failed to properly exercise its discretion in denying him probation because it relied upon an erroneous definition of "predatory." We conclude that defendant has failed to carry his burden on his equal protection claim and that the trial court properly exercised its discretion. We make a minor modification to the judgment regarding a restitution fine and otherwise affirm.

BACKGROUND

K. S. was 16 years old in 1999 and lived three houses away from defendant, who was then 35. K. S. lived with her mother, Karen, her older sister, J. S., and her mother's boyfriend, Michael. K. S. had been close to defendant since she was fairly young. Karen met defendant about four years prior to the offenses. Michael had been a close friend of defendant's for 20 years.

In April 1999, K. S. was sent to Utah to live with cousins due to problems at home. K. S. and defendant talked on the

telephone while K. S. was in Utah. K. S. returned from Utah in December but was not enrolled in school. When she returned, her mother would not let her leave the house except to go to defendant's house. During the Christmas vacation period, K. S. agreed to paint defendant's kitchen in exchange for defendant purchasing her Christmas presents.

Defendant and K. S. had a number of consensual sexual encounters during this vacation period.[2] On one occasion, K. S. and defendant took photographs of each other while having sex in defendant's bedroom.

On February 5, 2000, Karen and Michael discovered the relationship by reading a letter K. S. had written to a boy stating that she should have told him she had been sleeping with defendant. The next day, Michael spoke to K. S. and secretly taped the conversation. K. S. admitted the relationship. On February 7, while Karen took defendant out to a bar, K. S. went into defendant's home and took the film containing the incriminating photographs.[3] Late on February 8,

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[2] According to the prosecutor's arguments, there were at least five incidents. There were six incidents of oral copulation but five "representative" counts of intercourse. K. S.'s testimony is more equivocal, only specifying there were more than three incidents of sexual activity, each of which included a variety of acts.

[3] A summary of the defense witnesses is omitted because they questioned K. S.'s credibility, and defendant has admitted the sexual relationship.

2000, Karen called the police. This eventually led to defendant's convictions.

DISCUSSION

1. *Equal Protection*

Defendant contends that section 290, governing sex offender registration, violates his right to equal protection because registration for convictions under section 288a, subdivision (b)(1) (oral copulation with a minor) is mandatory, while registration for convictions under section 261.5 (unlawful sexual intercourse with a minor) is discretionary. (§ 290, subds. (a)(1)(A), (a)(2)(A), (a)(2)(E).) Defendant claims there is no rational basis for this distinction.

The People argue that defendant has waived this issue on appeal because he did not object to registration during the sentencing hearing. Defendant insists that defense counsel "had made quite clear to the sentencing court that [defendant] objected to the sex offender registration requirement." For example, when summarizing the plea bargain negotiations during in limine motions, the prosecutor noted the plea bargain offer was rejected by defendant because he did not want to plead to a registerable offense. And, defendant points out that at one other point during the trial, defense counsel stated, "'[h]e's never been willing to plead to any registerable charges.'" Nonetheless, defendant concedes that defense counsel did not object to the registration requirement during sentencing.

There are exceptions to the general rule that a party cannot raise an issue on appeal that was not preserved at

trial by appropriate objection. For example, pure matters of law based on uncontroverted facts are not waived. (*State of California ex rel. Public Works Bd. v. Bragg* (1986) 183 Cal.App.3d 1018, 1023-1024; *Wilson v. Lewis* (1980) 106 Cal.App.3d 802, 805.) Likewise, where an error is so fundamental and so gross in character as to result in a denial of due process, a defendant may raise the issue for the first time on appeal. (*People v. Mills* (1978) 81 Cal.App.3d 171, 176 (*Mills*).)

Even if defendant did not waive this issue, he failed to satisfy his burden in demonstrating an equal protection violation. We find the majority opinion in *People v. Jones* (2002) 101 Cal.App.4th 220 (*Jones*), and its reliance upon *Mills*, compelling in this respect. Said *Jones*: "*Mills* makes it clear that [a] defendant has the burden of showing that there is no rational basis for the legislative determination that persons who violate section 288a, subdivision (b)(1) [oral copulation] are likely to be recidivists and should be required to register as sex offenders under section 290. . . . [T]here is nothing in the record . . . to support [defendant Jones's] claim that requiring registration of persons convicted of section 288a, subdivision (b)(1) is not rationally related to the legitimate state interest served by section 290[.]" (*Jones, supra*, 101 Cal.App.4th at p. 229.)

The same can be said here. There is nothing in the record before us to support defendant's claim that there is no rational basis for distinguishing, for registration purposes, between sex

offenders who engage in oral copulation with a minor and sex offenders who engage in intercourse with a minor.

Defendant wants us to remand the equal protection issue to the trial court. In his opening brief, defendant suggests the issue has an important factual component. He points to the expert testimony he presented which showed he was a relatively low risk for reoffending. He asks that the case be remanded for the trial court to consider the equal protection issue and thereby to consider striking the registration requirement. In his reply brief, defendant claims the equal protection issue is one of law that we can address in the first instance. He urges us to find an equal protection violation, and to remand so the trial court can exercise its discretion regarding registration as if this case involved only section 261.5 violations. (See § 290, subd. (a)(2)(E).)

We are not persuaded. Defendant's request for a remand is nothing more than an attempted "end run" around the waiver or burden points explained above. In any event we note that, under any scenario that defendant has presented, he is still left with two convictions subject to mandatory registration (for section 289, subdivision (h) [foreign object penetration of minor]). (§ 290, subd. (a)(2)(A).)

2. *Denial of Probation*

Defendant contends he is entitled to a new sentencing hearing because the trial court relied on a legally incorrect definition of "predatory" in evaluating his risk of reoffending. Defendant argues this mistake of law resulted in an improper

exercise of sentencing discretion. Defendant does not claim the trial court abused its discretion, or that the reasons the trial court cited in denying probation are inadequate. Rather, defendant maintains the court exercised its discretion pursuant to a legally incorrect standard. We disagree.

Discretionary sentencing choices such as the decision whether to grant probation are to be the product of "'informed discretion.'" (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) A trial court does not exercise "informed discretion" when it is unaware of the scope of its discretionary powers. (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1247-1248.)

At sentencing, the trial court considered four psychological evaluations of defendant: a report by Dr. Bruce W. Ebert, a psychologist retained by defendant; a report by defendant's therapist, Dr. Sylvia Newberry; a diagnostic evaluation by the California Department of Corrections; and a report by court-appointed psychologist Dr. Janice Nakagawa. The trial court also considered defendant's probation report and heard additional testimony. J. S., K. S.'s sister, testified to an intimate relationship with defendant from the time she was 14 until she was 17. Dr. Ebert discussed what impact, if any, J. S.'s testimony had on his initial conclusions about defendant's risk of reoffending.

In his report, Dr. Ebert used a risk analysis procedure generally accepted for predicting the likelihood of recidivism among sex offenders. He stated this procedure was the same one used to determine if someone is a sexually violent predator

under the Sexually Violent Predators Act. (See Welf. & Inst. Code, § 6600, subd. (e).) Dr. Ebert concluded defendant's conduct was more opportunistic than predatory. Based on the risk analysis factors, Dr. Ebert placed defendant in the 21st percentile, among sex offenders, regarding defendant's likelihood to reoffend. According to Dr. Ebert, this means there is a 15 percent chance that defendant will commit a sexual offense in the next seven years.

The trial court denied probation, citing the nature and seriousness of the crimes, the vulnerability of the victim, the infliction of emotional injury on the victim, the absence of provocation, and the fact that defendant took advantage of a position of trust. In reference to Dr. Ebert's testimony and report, the trial court noted, "I . . . don't quite understand Dr. Ebert's proposition that the defendant is not a danger to others because . . . his crime's [*sic*] opportunistic and not predatory. I mean, to me in the English language -- there obviously is some special meaning of the word 'predatory' in the psychological field. It must be a term of art, because to me 'predatory' means someone who among other things takes advantage of a youngster this age, teenager this age. [¶] Umm, Dr. Ebert puts a different definition on it and he . . . limits predatory to someone who basically goes strolling in parks for strangers. I certainly don't think that is the limit of predatory behavior."

As we shall explain, while the trial court's comments that those who take advantage of teenagers are "predatory" and

"dangerous" is certainly a different opinion than that offered by Dr. Ebert, the trial court did not improperly exercise its discretion in denying probation. The court's use of the term "predatory" was proper in the context of its probation decision. (See *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978, quoting *People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 831 ["'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary [or contrary to the law]. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives . . . .'"].)

Preliminarily, we conclude that defendant has not waived this issue by failing to object to the statement of reasons given by the trial court when it denied probation. The sentencing process continued through seven appearances over six months. The process focused on whether defendant should be granted probation. Defense counsel filed several statements in mitigation that argued in favor of probation, and counsel consistently focused on defendant's lack of danger to others.

In considering the issue of probation, the trial court was required under section 1203.067 to consider diagnostic evaluations and to evaluate defendant's dangerousness to the victim.[4] Although a diagnostic evaluation may find a defendant

[4] Section 1203.067 provides in pertinent part:

suitable for probation, it is still up to the trial court to exercise its discretion when determining whether a defendant should be placed on probation. The question of whether defendant was "predatory," however defined, was not a required consideration. We agree with defendant that "predatory" has a particular meaning under the Sexually Violent Predators Act (hereafter SVPA) (Welf. & Inst. Code, § 6600 et seq.), but that

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"(a) Notwithstanding any other law, before probation may be granted to any person convicted of a felony specified in Section . . . 288a[] or 289, who is eligible for probation, the court shall do all of the following: [¶] (1) Order the defendant evaluated pursuant to Section 1203.03 [diagnostic evaluation], or similar evaluation by the county probation department. [¶] (2) Conduct a hearing at the time of sentencing to determine if probation of the defendant would pose a threat to the victim. The victim shall be notified of the hearing by the prosecuting attorney and given an opportunity to address the court. [¶] (3) Order any psychiatrist or psychologist appointed pursuant to Section 288.1 to include a consideration of the threat to the victim and the defendant's potential for positive response to treatment in making his or her report to the court. Nothing in this section shall be construed to require the court to order an examination of the victim.

"(b) If a defendant is granted probation pursuant to subdivision (a), the court shall order the defendant to be placed in an appropriate treatment program designed to deal with child molestation or sexual offenders, if an appropriate program is available in the county.

"(c) Any defendant ordered to be placed in a treatment program pursuant to subdivision (b) shall be responsible for paying the expense of his or her participation in the treatment program as determined by the court. The court shall take into consideration the ability of the defendant to pay, and no defendant shall be denied probation because of his or her inability to pay."

statute applies only to a particular class of dangerous sex offenders and defendant was not one of them.[5]

In exercising its discretion whether to grant or deny probation, the trial court was not deciding whether defendant was a "predator" under the SVPA. As the trial court noted, "predatory" may mean a different thing to a clinician than to a court charged with different responsibilities. The trial court used a lay definition of "predator" to describe defendant's dangerousness. By doing so, the trial court did not exercise its discretion pursuant to a legally incorrect standard. Rather, the court simply expressed its disagreement with Dr. Ebert's characterization of defendant based on the factors the court was required to consider under section 1203.067.

The trial court exercised care in its efforts to get accurate evaluations, particularly after the victim's sister finally confirmed her own involvement with defendant over a period of several years before he took up with K. S. It was clear, as defendant admitted, that he took advantage of a position of trust with K. S. The pattern of using this opportunistic advantage on two underage girls became apparent at sentencing. Based upon the trial court's familiarity with

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[5] On appeal, defendant points out that Dr. Ebert's definition of "predatory" was consistent with the legal definition of "predatory" contained in the SVPA: ". . . an act [that] is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization." (Welf. & Inst. Code, § 6600, subd. (e); see also *People v. Hurtado* (2002) 28 Cal.4th 1179.)

defendant, the crimes and the lengthy sentencing record, we see no legal basis to overturn the decision of the trial court denying probation.

3. *Restitution Fine*

The trial court imposed a restitution fine of $500 under section 1202.4, subdivision (b). The trial court failed to impose an identical suspended parole revocation restitution fine as required by section 1202.45. Because this presents a pure question of law, we shall correct it. (*People v. Smith* (2001) 24 Cal.4th 849, 853.)

DISPOSITION

The judgment is modified to include a $500 suspended parole revocation restitution fine under section 1202.45.

The trial court is directed to prepare a modified abstract of judgment and to forward a certified copy to the Department of Corrections.

As modified, the judgment is affirmed.

DAVIS, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.